Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

GEORGE M. DUNSMORE, COMMISSIONER OF AGRICULTURE AND PAUL RUSE, JR., TREASURER,

Petitioners,

v.

CHARLES W. HELEBA, JOHN HIBBARD, HAROLD MILLS, PHILIP PINKOWSKI, SR., JOHN L. WILLIAMS, AND R.H. WILLIAMS,

Respondents.

Petition For A Writ Of Certiorari To The Vermont Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, contrary to the holding in *Will v. Michigan State Police*, 491 U.S. 58 (1989), the Vermont Supreme Court has expanded the definition of "person" as that term is used in 42 U.S.C. §1983, to allow for retroactive monetary relief?

LIST OF PARTIES

The parties to the proceedings below were Ronald A. Allbee, former Vermont Commissioner of Agriculture and Emory Hebard, former Vermont Treasurer, in their individual and official capacities, and Respondents Charles W. Heleba, John Hibbard, Harold Mills, Philip Pinkowski, Sr., John L. Williams and R.H. Williams. Pursuant to V.R.C.P. 25 (d)(2) George M. Dunsmore, Vermont Commissioner of Agriculture and Paul Ruse, Jr., Vermont Treasurer, petitioners, automatically became parties to the case in their official capacities when they attained their current offices. Former Commissioner Allbee and Former Treasurer Hebard have been dismissed from the matter in their individual capacities and are therefore not named as parties herein.

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No. _____

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v.

CHARLES W. HELEBA, JOHN HIBBARD, HAROLD MILLS, PHILIP PINKOWSKI, SR., JOHN L. WILLIAMS, AND R.H. WILLIAMS,

Respondents.

Petition For A Writ Of Certiorari To The Vermont Supreme Court

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Vermont Supreme Court (Gibson, A.J.) has not been reported. It is reprinted in Appendix A, pp. 1a-16a.

The summary judgment opinion and order of the Rutland Superior Court (Mahady, S.J.) has not been reported. It is reprinted in Appendix B, pp. 17a-21a.

JURISDICTION

Suit was originally filed on June 8, 1988, by Respondents in Rutland Superior Court pursuant to 42 U.S.C. §1983. On December 21, 1989, the Rutland Superior Court denied Respondents' motion for summary judgment and, at the same time, granted the summary judgment motion of former Commissioner Allbee and former Treasurer Hebard. *See* Appendix B, p. 20a.

Respondents then appealed to the Vermont Supreme Court. On January 17, 1992, that court reversed the Superior Court's decision as to the Petitioners in their official capacities, but affirmed the dismissal of former Commissioner Allbee and former Treasurer Hebard in their individual capacities. *See* Appendix A, p. 16a. The matter was partially remanded to the Rutland Superior Court for further proceedings. Thus, the Vermont Supreme Court's order requires the State's Treasurer and Commissioner of Agriculture to submit themselves to trial on claims made against them in their official capacities.

On January 31, 1992, Petitioners filed a motion for reargument with the Vermont Supreme Court pursuant to Rule 40 of the Vermont Rules of Appellate Procedure (V.R.A.P.). The motion was denied on June 1, 1993. *See* Appendix C, p. 22a.

The jurisdiction of this Court to review the Judgment of the Vermont Supreme Court is invoked pursuant to 28 U.S.C. §1257(a), which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

> Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under the United States.

In this case, Vermont's highest court has issued a decision which seriously limits the rights and immunities of the State of Vermont under 42 U.S.C. §1983. Specifically, the Vermont Supreme Court's decision went contrary to *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), which held that a state is not a person within the meaning of §1983. In essence, the court has expanded the definition of "person" within the meaning of §1983 beyond what was intended by Congress, and, by doing so, has denied the State its right not to be sued under §1983.

The Vermont Supreme Court's decision should be considered final within the meaning of 28 U.S.C. §1257. That court has issued a decision allowing a suit against the State of Vermont to proceed under 42 U.S.C. §1983, and that decision is not subject to further review at the state level. *See Perkins v. Vermont Hydro-Electric Corp.*, 106 Vt. 367, 177 A. 631 (1935).

Moreover, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court noted that the final judgment requirement should not be mechanically applied. This Court found that there are at least four types of cases

which may be heard on appeal even though further proceedings may be pending in the state courts below. Cox's fourth category is directly applicable to this case. Cases falling into that category involve two or three factors: "[f]irst, reversal of the state court would preclude any further litigation, 'rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.' Second, refusal of immediate review 'might seriously erode federal policy.' " 16 Wright and Miller, *Federal Practice and Procedure*, §4010 at 591-592 (1977); citing *Cox*, 420 U.S. at 483. In addition, some of the cases in this class utilize a third factor, which is the "separability of the federal question from the underlying claim." 16 Wright and Miller, *Federal Practice and Procedure*, §4010 at 592 (1977).

In this case, the entire matter may be resolved by this Court's simply applying the precedent established in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). This would obviate the need for trial and the attendant waste of judicial resources. Moreover, the State of Vermont has raised several defenses to the underlying claims. Success on any of these defenses at trial would remove this Court's ability to correct the Vermont Supreme Court's decision and have the unfortunate effect of leaving precedent intact that runs directly contrary to this Court's caselaw regarding §1983 causes of action. In addition, the issue of whether the State is a person for purposes of suit under §1983 is easily separable from the merits.

More importantly, however, failure to immediately review the question presented in this Petition could seriously undermine Congressional authority to limit causes

of action. In this case the Vermont Supreme Court's decision has the effect of redefining the term "person" for purposes of 42 U.S.C. §1983 to include a state; this expansion of federal jurisdiction was not intended by Congress and is, therefore, a decision that could seriously erode federal policy within the meaning of *Cox*. *See Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989).

In previous decisions this Court has found that federal policy was potentially eroded when state courts improperly exercised jurisdiction. *See Belknap, Inc. v. Hale,* 463 U.S. 491 (1983); *Local No. 438 Construction & General Laborers' Union v. Curry,* 371 U.S. 542 (1963). It has also found that it had jurisdiction when there was a question about venue among state courts. *See Citizens & So. Nat. Bank v. Bougas,* 434 U.S. 35 (1977); *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963). This case stands on a similar footing. Here, a state court has asserted jurisdiction where none exists under federal law.

The importance of this issue is underscored by *Mitchell v. Forsyth,* 472 U.S. 511 (1985), and *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.,* 113 S.Ct. 684 (1993). In *Mitchell,* this Court ruled that the denial of an immunity claim by a federal district court is immediately appealable to a federal court of appeals. More recently, in *Puerto Rico Aqueduct and Sewer Auth.,* this Court held that a denial of an Eleventh Amendment motion by a federal trial court may also be appealed prior to trial. In both cases the Court recognized the importance of resolving the immunities questions prior to forcing public officials to go through a trial:

> Denials of States' and state entities' claims to Eleventh Amendment immunity purport to be conclusive determinations that they have no right not to be sued in federal court. Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, whose resolution generally will have no bearing on the merits of the underlying action. Finally, the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice. [Citations omitted.]

Puerto Rico Aqueduct and Sewer Auth., 113 S.Ct. at 688.

Accordingly, it must be concluded that the United States Supreme Court has jurisdiction to grant this Petition for Certiorari pursuant to 28 U.S.C. §1257(a).

Additionally, jurisdiction in this case may be premised on the collateral order doctrine for appeals from state courts under 28 U.S.C. §1257(a). Under that doctrine, the Supreme Court has allowed appeals from a federal trial court to a court of appeals where a state or federal official has been denied an immunity defense. Inasmuch as "[t]he entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial," *Puerto Rico Aqueduct and Sewer Auth.*, 113 S. Ct. at 687, *quoting from Mitchell*, 472 U.S. at 526, it would seem logical that the Court would treat an appeal from a state supreme court in much the same manner as one from a federal district court determination.

The reasons for allowing immediate appeal from state courts are no less compelling than those cited by the Court for allowing appeal in federal cases. State officials should not be denied the right to appeal a collateral order simply because a plaintiff has chosen to file suit in state court.

STATUTE INVOLVED

42 U.S.C. §1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondents have challenged the eligibility requirement of the former Dairy Industry Income Stabilization Program (DIISP). 6 V.S.A. Chapter 164. *See* Appendix E, pp. 28a-35a. The program was a temporary measure designed to stabilize dairy farm income in Vermont for a one-year period. As of the time the Vermont Supreme

Court issued its decision, the DIISP had expired by its own terms and the legislature had repealed, by Public Act No. 79, §7 (1991), any remaining vestige of the program. *See* Appendix A, p. 7a, and Appendix D, p. 27a.

In passing the income stabilization program, the Legislature had determined that:

> Recent cuts in the federal dairy market price structure threaten this vital industry by reducing the income received by the Vermont dairy farmers to a bare minimum. The legislature therefore concludes that an emergency program to stabilize income received by dairy farmers must be enacted to preserve the dairy industry during this critical period.

6 V.S.A. §2991.

The Legislature expected that either Congress would take action on a regional dairy price policy or that an interstate compact imposing higher prices would be implemented during the course of the program. 6 V.S.A. §2991.

The Commissioner of Agriculture was given the responsibility for the administration of the program. 6 V.S.A. §2993. The State Treasurer was responsible for the administration of the Dairy Industry Income Stabilization Fund. 6 V.S.A. §2997.

Under the program, eligible dairy farmers received payment at the rate of $.50 for each hundred pounds of fluid milk produced, with a maximum payment of $5,000.00 per farm for the year the program was in place. Successful applicants received one payment in July of 1988 and another payment in April of 1989. The first payment was $2,000.00, or the estimated amount due for

the entire year, whichever was less. The second payment was based on actual production for the year, subtracting the amount of the previous payment. 6 V.S.A. §2996.

Respondents filed this action pursuant to 42 U.S.C. §1983, arguing that they should be allowed to participate in the program without meeting one of its key eligibility requirements. Under 6 V.S.A. §2994, persons wishing to take part in the DIISP were required to be members of a regional cooperative, such as the Regional Cooperative Marketing Agency (R.C.M.A.), which obtained "a market price for the participating producers' product that is above the federal market order price. . . . " 6 V.S.A. §2994. Respondents argued that the eligibility requirement violated their right of association[1] and right to equal protection[2] under the federal and state constitutions.

The R.C.M.A. referred to in §2994 was made up of dairy cooperatives and individual dairy farmers in 11 northeastern states. R.C.M.A.'s operation focused on obtaining a higher market price for the fluid milk produced by its members than the federally established order (minimum) price. This differential is called the "over order" price. The regional cooperative did not physically handle milk; rather, it worked much like a labor union to assure that farmers received the over order price from their handlers or cooperatives, and thereby enabled individual and small group of farmers to work together to receive a fair price for their milk. Moreover, it did not charge any dues or assessments of its members.

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[1] U.S. CONST. Amend. I; VT. CONST. Ch. 1, Art. 13.

[2] U.S. CONST. Amend. XIV; VT. CONST. Ch. 1, Art. 1, 3, 9.

R.C.M.A. continued to exist throughout the pertinent time period.

Petitioners raised a number of defenses to the suit. In a supplemental memorandum of law supporting its summary judgment motion filed with the Rutland Superior Court shortly after the decision in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), was handed down, the State specifically argued that, under *Will*, the Respondents were not "persons" within the meaning of §1983. The trial court, however, granted the Respondents' motion for summary judgment on sovereign immunity grounds and did not reach the issue of whether the State of Vermont is a person within the meaning of 42 U.S.C. §1983. *See* Appendix B, p. 20a. On appeal, Respondents again cited *Will* and argued that the State is not a person for purposes of §1983. The Vermont Supreme Court, however, allowed for the possibility of retroactive monetary relief by ruling that:

> The federal courts have developed an equitable doctrine to allow funds from statutorily created programs to be paid to deserving plaintiffs even after a program expires, as long as the lawsuit was instituted on or before the expiration date. *West Virginia Ass'n of Community Health Centers v. Heckler*, 734 F.2d 1570, 1576-77 (D.C. Cir. 1985); *State of Connecticut v. Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982); *Jacksonville Port Authority v. Adams*, 556 F.2d 52, 55-57 (D.C. Cir. 1977). Equitable relief is ordinarily limited to funds remaining after the program expires. *West Virginia*, 734 F.2d at 1577.

See Appendix A, p. 7a.

None of the cases cited by the Vermont Court concerned a civil rights suit under §1983 against a state. More curiously, the court did not explain why *Will* was not controlling.

On January 31, 1991, Respondents filed a timely motion for reargument, which again raised the question of whether the State of Vermont could be considered a "person" within the meaning of 42 U.S.C. §1983. The Vermont Supreme Court denied the motion on June 1, 1993, ruling that the state had raised no new arguments that the Court had not already considered. *See* Appendix C, p. 22a.

REASONS FOR GRANTING THE WRIT

The State of Vermont is not a "person" within the meaning of 42 U.S.C. §1983 and therefore the Vermont Supreme Court erred when it ruled that the suit against it should not be dismissed under federal law.

Without directly saying so, and in violation of all relevant precedent, the Vermont Supreme Court has allowed a §1983 action for retroactive monetary payments to proceed against the State of Vermont. *Will v. Michigan Dep't of State Police*, 491 U.S. 50 (1989), established that the State, and its officials when they are acting in their official capacities, are not "persons" within the meaning of 42 U.S.C. §1983 and, accordingly, may not be subject to suit for violations of that provision of the federal Civil Rights Act. *See also Shields v. Gerhart*, 155 Vt. 141, 150, 582 A.2d 153 (1990). The only exception to this rule is for

actions seeking prospective injunctive relief against state officials. *See Will*, 491 U.S. at 71, n.10.

The distinction between prospective and retrospective relief is best understood by examining the U.S. Supreme Court precedent concerning the application of the Eleventh Amendment to suits against states in federal courts.[3] In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Supreme Court dealt with a case in which the trial court had granted relief that included an order to repay benefits wrongly withheld from otherwise eligible welfare recipients prior to the entry of the preliminary injunction. In deciding the matter, this Court noted that its earlier decision in *Ex parte Young*, 209 U.S. 123 (1908), allowed only for prospective relief aimed at bringing the *future* conduct of state officials into conformance with federal law. The *Edelman* court went on to reject the lower court's attempt to do what the Vermont court has done here, which is to recast retroactive damages as a form of prospective equitable relief:

> [The order] requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when the petitioner was under no court-imposed obligation to conform to a different standard. *While the Court*

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[3] As the U.S. Supreme Court has noted in *Will*, 491 U.S. at 66-67, "in deciphering congressional intent as to the scope of §1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of §1983 that disregards it."

> *of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State.* It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Id., 415 U.S. at 668 (emphasis added).

Thus, the *Edelman* Court ruled that the portion of the judgment which required the payment for damages incurred "at a time when petitioner was under no court-imposed obligation to conform to a different standard," was a retroactive award of damages against the state and therefore in violation of the Eleventh Amendment.

"[W]hether relief is retrospective or prospective should be evaluated as of the date that [state officials are] placed under a federal court obligation to comply with federal law." 1 Schwartz, *Section 1983 Litigation: Claims Defenses, and Fees* §8.7 (2d Ed. 1991). This is the rule generally followed by the lower federal courts. *Buckhanon v. Percy*, 708 F.2d 1209 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Elliott v. Hinds*, 573 F. Supp. 571 (N.D. Ind. 1983); *Holley v. Lavine*, 464 F. Supp. 718 (W.D.N.Y. 1979), *aff'd*, 605 F.2d 638 (2d Cir. 1979), *cert. denied*, 464 U.S. 913 (1980).

The *Holley* decision is illustrative: that case involved an improper denial of a preliminary injunction motion. Four years later, after two appeals and reversals, a second district court judge held that:

> With the benefit of hindsight, it is clear that most of the plaintiff's damages could have been avoided if the district court had correctly applied the law at the time that the plaintiff moved for preliminary relief. But this does not change the retroactive nature of a damage award at this stage of the proceedings. The plaintiff is not seeking a payment of state funds as a necessary consequence of future compliance with a federal court order but rather an award of public assistance payments wrongfully withheld in the past. This type of relief is barred by *Edelman*.

Id., 464 F. Supp. at 722.

Thus, the *Holley* court followed *Edelman* and refused to grant equitable retroactive relief even though there had been a mishandling of the motion for preliminary relief. The Vermont Supreme Court should have reached the same result under the applicable federal precedent. The real party-in-interest here is the State of Vermont, which is not a proper party defendant to a §1983 action under *Will*, yet the court has permitted the possibility of the State's being liable for a retroactive monetary payment.

In its opinion, Vermont's Supreme Court cited some federal precedent in support of its ruling that the Respondents' claims are not moot. Petitioners respectfully submit that under *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), the dispositive issue in the instant case is not mootness, but whether the relief requested is retroactive in nature. If so, and contrary to established precedent, the State of Vermont would be held to be a "person" within the meaning of §1983.

Moreover, only one of the federal cases relied upon by the Vermont Supreme Court dealt with a complaint filed pursuant to 42 U.S.C. §1983. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the controversy involved a city, and not a state entity. As a consequence, there were no Eleventh Amendment constraints or §1983 limitations on the granting of retrospective relief. *See Monell v. N.Y. City Dep't of Social Services*, 436 U.S. 658 (1978); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1988). The remaining cases cited by the Vermont Court concern suits against the federal government in which the issue of whether or not the government actor was a person within the meaning of §1983 was not raised. Therefore, those opinions are not applicable to the present matter. *See Reed v. Bullock*, 872 F.2d 671 (5th Cir. 1989) (case law characterizing back pay awards as being equitable in nature is not applicable because it did not concern the Eleventh Amendment).

The central question of whether the State is a "person" within the meaning of 42 U.S.C. §1983 can only be resolved by reviewing the federal case law concerning prospective and retrospective relief. Under the rule announced in *Edelman v. Jordan*, 415 U.S. 651 (1974), the relief requested in this case is clearly retrospective in nature because the allegedly wrongful failure to pay funds under a now-defunct program occurred prior to any court order being issued.

Essentially, the Vermont Supreme Court has tried to recast a retroactive award of monetary relief as a form of equitable restitution, contrary to the clear holding of *Edelman v. Jordan*, 415 U.S. 651 (1974). By doing so, the court has violated the rule of *Will v. Michigan Dept. of*

State Police, 491 U.S. 58 (1989) by exposing the State to liability as a "person" under §1983. Accordingly, as the State acting through Petitioners is not a "person" under §1983, the case against the petitioners in their official capacities should be dismissed.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted and respondents' case against the petitioners should be dismissed.

Respectfully submitted,

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APPENDICES

APPENDIX A

ENTRY ORDER

SUPREME COURT DOCKET NO. 90-054

APRIL TERM, 1991

Charles W. Heleba, John Hibbard, Harold L. Mills, Philip Pinkowski, Sr., Lowell W. Segard [sic], John L. Williams and R.H. Williams	APPEALED FROM:
v.	Rutland Superior Court
Ronald Allbee, Commissioner of Agriculture; State of Vermont	DOCKET NO. S291 88Rc
	(Filed Jan. 17, 1992)

In the above entitled cause the Clerk will enter:

Plaintiff's claim against defendant in their official capacities is reversed and remanded; the balance of the judgment is affirmed.

FOR THE COURT:

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

Concurring:

/s/ Frederic W. Allen
Frederic W. Allen,
Chief Justice

/s/ John A. Dooley
John A. Dooley,
Associate Justice

/s/ J. L. Morse,
James L. Morse,
Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson,
Associate Justice

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.

No. 90-054

Charles W. Heleba, John Hibbard, Harold L. Mills, Philip Pinkowski, Sr., Lowell W. Seward, John L. Williams and R.H. Williams	Supreme Court On Appeal from Rutland Superior Court
v.	April Term, 1991
Ronald Allbee, Commissioner of Agriculture; State of Vermont	(Filed Jan 17, 1992)

Frank G. Mahady, J.

Peter H. Banse of Banse & McCoy, Manchester Center, for plaintiffs-appellants

Jeffrey L. Amestoy, Attorney General, William E. Griffin, Chief Assistant Attorney General, and William H. Rice, Assistant Attorney General, Montpelier, for defendants-appellees

PRESENT: Allen, C.J., Gibson, Dooley, Morse and Johnson, JJ.

GIBSON, J. Plaintiff challenge the constitutionality of the Dairy Industry Income Stabilization Program (DIISP), 6 V.S.A. §§ 2991-2998, contending that (1) there is no rational basis for the program's exclusion of farmers who

are not members of a cooperative, and (2) such discrimination violates their constitutionally protected freedom of association.

The DIISP subsidizes dairy farmers who meet certain eligibility requirements, including membership in a regional marketing cooperative. Plaintiffs are dairy farmers who do not belong to a cooperative. They initiated this suit under 42 U.S.C. § 1983 against defendants Ronald Allbee, Commissioner of Agriculture, and Emory Hebard, State Treasurer, in their official and individual capacities.

The trial court granted defendants' motion for summary judgment and dismissed the suit in its entirety. It ruled that, insofar as defendants were sued in their individual capacities, they were entitled to qualified immunity from the § 1983 claim and absolute immunity from the claim grounded on the Vermont Constitution. With respect to the claims against defendants in their official capacities, the court concluded that the State of Vermont was the real party in interest and was entitled to sovereign immunity. On appeal, plaintiffs contend that (1) the State has waived its sovereign immunity, and (2) defendants are not entitled to qualified immunity.[1] We affirm

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[1] Plaintiffs do not independently analyze their Vermont constitutional claim, and we therefore do not address it. See *Shields v. Gerhart*, 155 Vt. 141, 151, 582 A.2d 153, 159 (1990) (noting that it is an open question whether a damages action can be grounded on violations of Vermont Constitution, Court declined to address defense of sovereign immunity to such claims where it was not argued); *State v. Gleason*, 154 Vt. 205, 212, 576 A.2d 1246, 1250 (1990) (proponent bears burden of explaining how or why the Vermont Constitution affords

with respect to defendants in their individual capacities but reverse and remand for trial against defendants in their official capacities.

I.

Plaintiffs argue that the State waived its sovereign immunity when the Legislature reserved a portion of the DIISP appropriation for payment of plaintiffs' claims, should their suit be successful. Defendants argue that the waiver, if made, was revoked when the State subsequently spent the money for other purposes. Both parties mischaracterize the issue.

The elements of, and the defenses to, a § 1983 action are defined by federal law. *Howlett v. Rose*, 110 S.Ct. 2430, 2442 (1990). A state may not create a cause of action under § 1983 against any entity that Congress has not subjected to liability. *Id.* at 2442-43. Thus, if a state is not a "person" as that term is used in § 1983, it cannot be subjected to suit, whether it waives sovereign immunity or not. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 85 (1989) (Brennan, J., dissenting) ("If States are not 'persons' within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit.").

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greater rights than the federal constitution). Further, we note that 42 U.S.C. § 1983 does not provide a means to litigate alleged violations of the Vermont Constitution. See *Williams v. State*, 156 Vt. ___, ___, 589 A.2d 840, 843 (1990) (§ 1983 "provides a private remedy for those alleging abridgement of *federal* rights") (emphasis added).

The United States Supreme Court has ruled that neither a state nor a state official sued in an official capacity for damages is a "person" for purposes of a § 1983 action. *Will*, 491 U.S. at 71. Thus, when a state official is sued solely as an official, money damages and other retroactive relief are normally unavailable. See *Shields v. Gerhart*, 155 Vt. 141, 152, 582 A.2d 153, 159 (1990) (dismissing § 1983 action for damages brought against state employees in their official capacities).

Nevertheless, the Supreme Court also has held that a state official sued in his or her official capacity for injunctive relief "*would be* a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " *Will*, 491 U.S. at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)) (emphasis added). Moreover, even if a suit for prospective relief implicated prospective expenditures of state funds, that would not be grounds for dismissal. See *id.*; *Kentucky v. Graham*, 473 U.S. at 169 n.18 ("Monetary relief that is 'ancillary' to injunctive relief also is not barred by the Eleventh Amendment"); *Milliken v. Bradley*, 433 U.S. 267, 289, 293-95 (1977) (state ordered to pay $5.8 million to fund a desegregation decree); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974) (prospective court orders mandating officials to conduct (themselves in certain ways are permissible even if they involve payments from state treasuries).

Thus, plaintiffs' right to recover prospective monetary relief under the DIISP does not depend on whether the State has set aside and maintained a contingency fund for this purpose. If the DIISP were still operating and if plaintiffs satisfactorily established their right to be

included in it, they would be entitled to injunctive and declaratory relief – assuming success on the merits herein – that would ensure their future participation. The DIISP expired by its own terms, however, on April 30, 1989, see 1987, No. 200 (Adj. sess.), § 62, and the Legislature, on June 26, 1991, repealed any remaining vestige of the program. See 1991, No. 79, § 7. Thus, the question becomes whether plaintiffs' claims are now moot.

Ordinarily, "[c]laims for damages or other monetary relief automatically avoid mootness." C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.3 at 262 (1984); see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) (expiration of ordinance requiring those who have contracts with city to subcontract 30% of value of contract to minority businesses does not moot contract bidder's § 1983 claim challenging constitutionality of the Ordinance after its bid was refused for failing to meet 30% requirement). Here, a live controversy remains concerning whether plaintiffs suffered monetary loss because of an illegal application of the DIISP.

The federal courts have developed an equitable doctrine to allow funds from statutorily created programs to be paid to deserving plaintiffs even after a program expires, as long as the lawsuit was instituted on or before the expiration date. *West Virginia Ass'n of Community Health Centers v. Heckler*, 734 F.2d 1570, 1576-77 (D.C. Cir. 1984); *State of Connecticut v. Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982); *Jacksonville Port Authority v. Adams*, 556 F.2d 52, 55-57 (D.C. Cir. 1977). Equitable relief is ordinarily limited to funds remaining after the program expires. *West Virginia*, 734 F.2d at 1577.

Here, plaintiffs brought a timely suit, long before the DIISP expired. In their complaint they sought a preliminary injunction; no hearing on the matter was scheduled and plaintiffs thus lost their only opportunity for timely relief. In the federal cases, denial of such preliminary relief to preserve a plaintiff's claim, has been found to be an abuse of discretion. *Jacksonville*, 556 F.2d at 58-59. In the instant case, the Legislature reserved a portion of DIISP funds for plaintiffs' claim – apparently securing relief if they prevailed – but, after the budget year ended without resolution of the lawsuit, dissolved the fund. Under these facts, plaintiffs' claim is not moot.

II.

With respect to the claim against defendants in their individual capacities, plaintiffs contend that defendants are not entitled to qualified immunity. Qualified immunity attaches to public officials who (1) act during the course of their employment and act, or reasonably believe they act, within the scope of their authority; (2) act in good faith; and (3) perform discretionary, as opposed to ministerial, acts. *Murray v. White*, 155 Vt. 621, 627, 587 A.2d 975, 979-80 (1991). Plaintiffs appear to concede the first requirement, but argue that defendants did not act in good faith and performed merely ministerial acts. We conclude, however, that defendants are entitled to qualified immunity.

A.

Plaintiffs argue that, as a matter of law, defendants were not acting in good faith because they continued to

reject plaintiffs' applications for inclusion in the program after this lawsuit was initiated. "Good faith exists where an official's acts did not violate clearly established rights of which the official reasonably should have known." *Murray v. White*, 155 Vt. at 630, 587 A.2d at 980 (footnote omitted). Mere initiation of a lawsuit does not create a clearly established right. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (an official is not expected to anticipate subsequent legal developments). Whether an official protected by qualified immunity may be held personally liable for allegedly unlawful official actions will generally depend on the " 'objective legal reasonableness' " of the actions. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 819). Thus, the test is an objective one, requiring a determination of the objective reasonableness of an official's conduct, as measured by reference to clearly established law. *Harlow*, 457 U.S. at 818. Subjective good faith is thus ordinarily irrelevant. *Anderson v. Creighton*, 483 U.S. at 641. In the instant case, plaintiffs have not shown that defendants violated any clearly established legal rights or that the trial court erred in its determination that defendants acted in objective good faith.

B.

We turn now to the more difficult issue of whether defendants should be denied qualified immunity because their acts were merely "ministerial" in nature.[2]

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[2] The parties have not addressed the threshold question of whether the common law's discretionary/ministerial distinction applies in the context of a § 1983 action. Without discussion,

Plaintiffs' argument is grounded upon *Libercent v. Aldrich*, 149 Vt. 76, 539 A.2d 981 (1987), where we defined "a discretionary duty as one requiring the exercise of judgment in its performance, and a ministerial duty as one where 'nothing is left to discretion – a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist.' " *Id.* at 81, 539 A.2d at 984 (quoting *State v. Howard*, 83 Vt. 6, 14, 74 A. 392, 395 (1909)). Relying on these definitions, plaintiffs argue that the statutory eligibility requirements leave no "discretion" to defendant Allbee. If individuals, such as plaintiffs, are not members of a regional marketing cooperative, they are clearly not eligible for a DIISP subsidy under the statute.[3] As for defendant Hebard,

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we assumed in *Murray v. White*, 155 Vt. 621, 627, 587 A.2d 975, 978 (1991) that ministerial duties are not entitled to qualified immunity. Courts are split on this issue, however, with some courts concluding the distinction does not apply to § 1983 actions. *Coleman v. Frantz*, 754 F.2d 719, 728 (7th Cir. 1985); *Withers v. Levine*, 615 F.2d 158, 163 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980). Other courts hold that it does apply. *Saul v. Larson*, 847 F.2d 573, 576 (9th Cir. 1988); *Jordan v. Sinsheimer*, 403 Mass. 586, 589, 531 N.E.2d 574, 577 (1988).

The United States Supreme Court has not definitively resolved the issue. In the absence of clear authority to the contrary, we reaffirm our rule that, as a general proposition, the common law's discretionary/ministerial distinction does apply to qualified immunity determinations. See *Murray*, 155 Vt. at 629, 587 A.2d at 979-80.

[3] 6 V.S.A. § 2994 ("Eligibility standards") provided:

> Any dairy farmer who is a member of a regional marketing cooperative that encompasses the state of Vermont, including but not limited to the Regional Cooperative Marketing Agency, that obtains a market price for the participating producers' product that is

plaintiffs contend that he was required to issue checks to individuals certified by defendant Allbee as qualifying for the subsidy, but only to those individuals.[4] Thus, in plaintiff's view, defendant Hebard merely drew up, signed, and mailed checks to specified payees. In short, plaintiffs contend defendants should be denied qualified immunity because each one merely executed a simple and definite ministerial duty commanded by law.

The established definitions for "discretionary duty" and "ministerial duty" lend considerable force to plaintiffs' argument. We reject their argument, however, and recognize an exception to the general rule that only officers performing discretionary duties are entitled to qualified immunity. We hold that officers who, in objective good faith, obey a simple and definite legal command established by statute while acting, or reasonably believing they are acting, within the scope of their employment and authority, are qualifiedly immune from a suit that is

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> above the federal market order price shall be eligible for payment under this chapter. All dairy farmers shall be eligible for payment if no such organization is in operation.

The commissioner of agriculture, or his designee, was charged with reviewing applications for the DIISP. 6 V.S.A. § 2993; see *id.* § 2992(1). Plaintiffs make no argument that they were incorrectly denied eligibility under this section. Rather, they have expressly refused to join a regional marketing cooperative.

[4] Defendant Hebard has retired from his position as state treasurer and defendant Allbee is no longer commissioner of agriculture. The claims against them remain live controversies, however, since they occupied their official positions during the period in controversy.

grounded upon conduct prescribed by that statute.[5] As explained below, affording qualified immunity in these circumstances is consistent with generally accepted tort principles and with the purpose of the doctrine. See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (in determining immunity questions in § 1983 action, relevant factors are the scope of immunity at common law at the time § 1983 was enacted and the purposes of § 1983).

First, § 1983 actions are "to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Burns v. Reed*, 111 S.Ct. 1934, 1938 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). While the precise contours of the common law need not be slavishly followed, it is appropriate to look to the common law and other history for guidance. *Id.* at 1943.

Such an exception is amply supported by established principles of tort immunity law. Both Prosser and Keeton on The Law of Torts (5th ed. 1984) and F. Harper, F. James & O. Gray, The Law of Torts (2d ed. 1986) express an exception to the ministerial-act rule for the officer who obeys a valid court order or statute. Prosser and Keeton, *supra*, § 132, at 1066 ("In addition to whatever immunity is or is not available to the officer simply because of official status, there is a privilege to obey the command of judicial process fair on its face as well as the command of

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[5] Such a rule would not protect malfeasance. Rather, this rule is designed to protect the official who performs a legally commanded ministerial task, provided no clearly established rights are violated.

a valid statute.");[6] Harper, James & Gray, *supra*, § 29.10, at 669 (no liability for ministerial action where it is "justifiable as commanded by valid statute, order, etc."). Common law and Vermont precedent both similarly provide that an officer is privileged to execute a court order valid on its face. See *California v. Acevedo*, 111 S.Ct. 1982, 1992 (1991) (Scalia, J., concurring) (noting that absolute immunity existed at common law for officer who acted pursuant to a proper warrant); *Horton v. Chamberlin*, 152 Vt. 351, 353, 566 A.2d 953, 954 (1989), *Casselini v. Both*, 77 Vt. 255, 256, 59 A. 833, 833 (1905); *Gage v. Barnes*, 11 Vt. 195, 196 (1839); *Pierson v. Gale*, 8 Vt. 509, 511 (1836). Other courts have also indicated that immunity from personal liability exists where the official obeys an apparently valid legal command. See *United States v. Illinois Bell Tel. Co.*, 531 F.2d 809, 815 (7th Cir. 1976); *District of Columbia v. Thompson*, 570 A.2d 277, 293 (D.C. App. 1990)

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[6] Prosser and Keeton further explain:

> If the officer follows a writ which there is no reason to question, there is an immunity even in the face of personal malice, since regardless of mental state the officer is only complying with a legal duty. The problem in cases of this sort has often turned on the question whether the officer is privileged when he relies on a judicial order issued without jurisdiction or a statute that is unconstitutional. . . . [T]he older cases tended to hold the officer liable for technical defects in the command under which he justified his action, while the more recent ones tend to excuse him unless there was reason to doubt the validity of the order [or] statute.

Section 132, at 1066 (footnotes omitted).

(recognizing immunity for mandatory duties);[7] *Elzey v. Archer*, 500 N.E.2d 1253, 1256 (Ind. App. 1986) (arresting officer immune where arrest warrant was legally defective but appeared valid on its face), *cert. denied*, 484 U.S. 1008 (1988); see also *Barr v. Matteo*, 360 U.S. 564, 575 (1959) ("same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts"). Further, it would be incongruous for the officer who competently executes a mandatory duty to be held liable while the creator of the duty is absolutely immune. See *Valdez v. City of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989).

Second, such an exception serves the purposes of qualified immunity. The doctrine strikes an accommodation between competing interests. While personal liability "may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814, substantial social costs are attendant, including the expense and distraction of the litigation and deterrence from going into public service. *Id.; Levinsky v. Diamond*, 151 Vt. 178, 199, 559 A.2d 1073, 1087 (1989), *overruled on other grounds, Muzzy v. State*, 155 Vt. 279, 280 n.*, 583 A.2d 82, 83 n.* (1990). "In this balance, officials should fear suit only where they reasonably should know that suit is

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[7] This cases [sic] was reheard, 593 A.2d 621 (D.C. App. 1991), reversed in part and affirmed in part, on other grounds. In *Moss v. Stockard*, 580 A.2d 1011, 1018 n.12 (D.C. App. 1990), the court explained that the rehearing in *Thompson* involves issues of exhaustion of administrative remedies and notes that "the immunity analysis in *Thompson* is sound and that we would adopt it even if the *Thompson* opinion were vacated."

warranted, i.e., where the unlawfulness of their acts is apparent." *Murray*, 155 Vt. at 632, 587 A.2d at 981. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

If executive officials who have acted in accordance with a simple and definite statutory command can be sued personally, not only will the competent be unprotected from litigation, but additionally, "we are indeed likely to breed a race of do-nothing officials." Harper, James, & Gray, *supra*, § 29.10, at 678; see also *Forrester v. White*, 484 U.S. 219, 223 (1988) ("the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties") (emphasis in original); *Harlow v. Fitzgerald*, 457 U.S. at 814 ("there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or most irresponsible [public officials], in the unflinching discharge of their duties' ") (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). An official charged with implementing an apparently valid statute that establishes a simple and definite duty should not face the dilemma of shirking his or her duty or facing a likely law suit. As Justice Harlan explained in a slightly different context:

> A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would

> seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but was later held unconstitutional, on its face or as applied.

Pierson v. Ray, 386 U.S. 547, 555 (1967). *Pierson* involved a suit against police officers who arrested without a warrant certain ministers who had entered a "whites only" bathroom and cafeteria. The officers claimed that they arrested the ministers to prevent violence. The Court held that the common-law defense of good faith and probable cause was available to the officers in the § 1983 action. *Id.* at 557.

In the instant case, defendants, in the scope of their employment, competently executed a simple and definite duty mandated by a statute that violated none of plaintiffs' clearly established rights. For this, plaintiffs sued them personally. Exposure to personal liability in these circumstances tends to "detract from the rule of law instead of contributing to it." *Forrester v. White*, 484 U.S. at 223. Because affording defendants qualified immunity is consistent with the doctrine's purposes and with principles of tort immunity law, we affirm the trial court insofar as it dismissed the suit against defendants in their individual capacities.

Plaintiffs' claim against defendants in their official capacities is reversed and remanded; the balance of the judgment is affirmed.

FOR THE COURT:

/s/ Ernest W. Gibson III
Associate Justice

APPENDIX B

STATE OF VERMONT
RUTLAND COUNTY, SS.

CHARLES W. HELEBA, et al	)	
	)	RUTLAND SUPERIOR COURT
V.	)	
	)	DOCKET NO. S291-88Rc
RONALD ALLBEE, et al	)	(Filed Dec. 21, 1989)
	)	

OPINION AND ORDER

I.

In this action the Plaintiffs have challenged the constitutionality of the eligibility standards for the Dairy Industry Income Stabilization Program, *6 V.S.A. 2994*, a part of Act 200 of the 1988 General Assembly.

"Farmers," as defined by *6 V.S.A. 2992(2)*, qualified for the program provided that the farmer "is a member of a regional marketing cooperative that encompasses the State of Vermont, including but not limited to the Regional Marketing Agency, that obtains a market price for the participating producers' product that is above the federal market order price. . . . " *6 V.S.A. 2994*. The Plaintiffs are farmers, but none of them is a member of a regional marketing cooperative. They do not, therefore, qualify for the program.

The Plaintiffs allege that the statute violates U.S. CONST., Amend. I and XIV as well as VT. CONST., Art 1, 7, 9 and 13. The Defendants are the Commissioner of Agriculture and the former State Treasurer.

The relief sought by the Plaintiffs is an injunction restraining the exclusion of the Plaintiffs from participation in the Dairy Industry Income Stabilization Program as well as a declaratory judgment that the statutory exclusion is null and void on its face or as applied to the Plaintiffs.

II.

With regard to the Plaintiffs' state-based claims the Defendants are entitled to absolute immunity as a matter of law under the doctrine of official immunity. Clearly, they are to be included within the category of "the state's highest executive officers." As such, they are protected by absolute immunity where the acts complained of were performed within their respective authorities. *Curran v. Marcille,* No. 87-389, Slip op. at 2 (Vt. August 4, 1989); *Levinsky v. Diamond,* No. 85-551, Slip op. at 7-8 (Vt. February 17, 1989).

Our Court has previously held that the Commissioner of Motor Vehicles and the Commissioner of Corrections are to be considered to be among the state's highest executive officers. *Curran v. Marcille,* Slip op. at 2. Certainly, the Commissioner of Agriculture would also be so included. Our Court has also held that the Attorney General is to be so considered. *Levinsky v. Diamond,* Slip op. at 9. The State Treasurer is a Constitutional Officer as well. The acts complained of were authorized by the challenged statute and were therefore performed within the authority of the office of each Defendant.

III.

With regard to the Plaintiffs' federal-based claims, it is necessary to use the more functional analysis of the doctrine of official immunity under federal law. *Levinsky v. Diamond,* Slip op. at 18. That analysis confers absolute immunity only on judges, legislators and those involved in "quasi-judicial" functions. See, e.g., *Pierson v. Ray,* 386 U.S. 547 (1967) (judges); *Tenney v. Brandhove,* 341 U.S. 367 (1951) (legislators).

These Defendants, therefore, are entitled only to a qualified immunity under federal law. *Scheuer v. Rhodes,* 416 U.S. 232, 247 (1974). This qualified immunity varies with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action." *Id.*

Using this functional analysis, the Defendant's scope of discretion under the challenged statute was extremely narrow. The statute clearly directed them to exclude the Plaintiffs from the program. As such, the Defendants are entitled to official immunity as to the federal-based claims as well.

IV.

Insofar as the Defendants have been sued in their official capacities, it is clear that the real Defendant is the State itself. Clearly, "the judgment sought would expend itself on the public treasury or domain . . . (and) the effect of the judgment would be to restrain the Government from action, or to compel it to act." Under such circumstances, the suit is, indeed, against the sovereign. *Dugan*

v. Rank, 372 U.S. 609, 620 (1963); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978)).

The doctrine of sovereign immunity does not apply generally to suits challenging the constitutionality of a statute or its enforcement. It does, however, apply where the party initiating the suit seeks to collect money from the State. *American Trucking Association v. Conway*, No. 87-300, slip op. at 13 (Vt. August 25, 1989).

Although this action seeks to have a statute declared unconstitutional, the real effect of such a ruling would be to include the Plaintiffs in the Dairy Industry Income Stabilization Program thereby requiring the State to pay money to the Plaintiffs. What this suit seeks in reality is money from the State. The State is not subject to such a suit without its consent. *American Trucking Association v. Conway*, 146 Vt. 579, 587 (1986). The State of Vermont has not consented to a suit such as this one. See *12 V.S.A. 5601, 5602(1) and (4)*. Therefore, the doctrine of sovereign immunity precludes this action against the Defendants in their representative capacities.

V.

Accordingly, the Defendants' motion for summary judgment is granted, and judgment is hereby entered for the Defendants.

Dated at Rutland this 21st day of December, 1989.

/s/ Frank G. Mahady
HON. FRANK G. MAHADY
SUPERIOR JUDGE

APPENDIX C

ENTRY ORDER

SUPREME COURT DOCKET NO. 90-054

APRIL TERM, 1991

Charles W. Heleba, John Hibbard, Harold L. Mills, Philip Pinowski, Sr., John L. Williams, and R.H. Williams	)	APPEALED FROM:
	)	Rutland Superior Court
v.	)	DOCKET NO. S291-88Rc
Ronald Allbee, Commissioner of Agriculture and Emory Hebard, Treasurer	)	(Filed June 1, 1993)

In the above entitled cause the Clerk will enter:

Appellees' motion for reargument, filed January 31, 1992, fails to identify to points of law or fact misapprehended or overlooked by this Court. The motion is therefore denied.

BY THE COURT:

/s/ Frederic W. Allen
Frederic W. Allen, Chief Justice

/s/ Ernest W. Gibson III
Ernest W. Gibson III, Associate Justice

/s/ John A. Dooley
John A. Dooley, Associate Justice

/s/ James L. Morse
James L. Morse, Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson, Associate Justice

[ ] Publish

[ ] Do Not Publish

APPENDIX D

PUBLIC ACTS, 1991 SESSION

NO. 79. AN ACT RELATING TO THE DEPARTMENT OF AGRICULTURE, FOOD AND MARKETS.

(H.253)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 6 V.S.A. § 6 is amended to read:

§ 6. COMBINED LICENSES

The commissioner of agriculture, food and markets shall publish a combined application and shall issue a combined license for any person desiring to be licensed under more than one of the following provisions: retail vendors licensed under sections 1109, 2726 and 3306 of this title and *sections 2730 and* 3481(a) of Title 9. The license fee for the combined license shall not exceed the amount charged if each license were granted separately. *Combined licenses shall expire and be renewed annually on January 1 of each year.*

Sec. 1a. 6 V.S.A. § 15(a) is amended to read:

(a) In addition to other penalties provided by law, the commissioner may assess administrative penalties, not to exceed $1,000.00, for each violation of:

(1) 6 V.S.A. chapter 32, "maple products";

(2) 6 V.S.A. chapter 63, "livestock dealers, auctions and sales rings";

(3) 6 V.S.A. chapter 102, "livestock disease control";

(4) 6 V.S.A. chapter 107, "imports and exports"; *[and]*

(5) 9 V.S.A. chapter 73, "weights and measures *[.]*"; *and*

(6) 6 V.S.A. chapter 21, "grades and standards for farm products".

Sec. 2. 6 V.S.A. § 484 is amended to read:

§ 484. RECORDS; INSPECTION

(a) The commissioner may, by regulation, require all licensed dealers *or processors* to maintain specific records for the purchase and sale of maple products. Those records shall be kept in a full and accurate manner and shall be made available to the commissioner or his inspector upon request. The commissioner shall use those records only for purposes of administering this chapter, or for other law enforcement purposes, and shall otherwise keep them confidential.

(b) The commissioner or his inspector may enter upon the premises of a licensed dealer *or processor,* at reasonable times, for purposes of inspecting the premises, records, equipment and inventory in a reasonable manner to determine whether the provisions of this chapter and the regulations adopted hereunder are being observed. If entry is refused, the commissioner may apply to a superior or district court judge for an administrative search warrant.

Sec. 2a, 6 V.S.A. § 483(a) is amended to read:

(a) A dealer *or processor* who is doing business in this state, or who wishes to do business in this state

"[must]" *shall* first obtain a license to do so from the commissioner.

Sec. 3. 6 V.S.A. § 485(a) is amended to read:

(a) The commissioner may suspend, revoke or decline to grant a *dealer or processor* license for cause, or for failure of the applicant to provide all information which the commissioner may reasonably request. Before declining to grant a license, or suspending or revoking a license, the commissioner shall give at least ten days' notice to the applicant or licensee by registered or certified mail addressed to his last known address and afford him an opportunity to appear and be heard with respect thereto at a time and place specified in the notice. The applicant or licensee may be heard in person or by an attorney, and offer evidence pertinent to the subject of the hearing. Within 30 days after the hearing, the commissioner shall make findings of fact in writing and shall notify the applicant or licensee of his decision in writing.

Sec. 4. 6 V.S.A. § 1102(a)(10) and (b) are amended to read:

(10) Two members appointed by the governor. In choosing these members, the governor shall consider people who have knowledge and qualities that could be useful in pursuing the goals and functions of the council. One of these members shall have practical experience in commercial agricultural production *and shall be appointed in consultation with the commissioner.*

(b) Each state or university member of the council shall serve until his or her resignation or until his or her successor is appointed or otherwise designated in accordance with this chapter. Public members of the pesticide

advisory council shall be appointed for terms of three *years, except initially, appointments shall be made* such that one member shall serve for a term of one year "[,]" *and* one for a term of two years "[and one member for a term of three years]"

Sec. 5. 6 V.S.A. § 1104(15) is added to read:

(15) Require correction of sources of pesticide contamination that threaten human health or the environment.

Sec. 6. 9 V.S.A. § 2490 is amended to read:

§ 2490. REMEDIES AND PENALTIES

All remedies and penalties available to a "[person]" *consumer* and the attorney general under 9 V.S.A. chapter 63 shall apply to violations of this chapter.

Sec. 7. REPEAL

6 V.S.A. chapters 65 (relating to live poultry dealers) and 164 (relating to the dairy income stabilization program) are repealed.

Approved: June 26, 1991

APPENDIX E

Chapter 164. Dairy Industry Income Stabilization Program

SECTION

2991. Legislative findings.

2992. Definitions.

2993. Program established; payment authorized.

2994. Eligibility standards.

2995. Applications.

2996. Payment procedure; amount per farmer.

2997. Dairy industry income stabilization fund.

2998. Sale of farm: notification.

HISTORY

Revision note. The provisions of this chapter as enacted by 1987, No. 200 (Adj. Sess.), § 61, were originally designated as sections 2890-2897. However, for purposes of conformity with the classification system of V.S.A., sections 2890-2897, as enacted, were redesignated as sections 2991-2998.

Expiration of chapter. 1987, No. 200 (Adj. Sess.), § 62, eff. May 19, 1988, provides for the termination of section 61 of the act, which added the provisions of this chapter, on April 30, 1989.

§ 2991. Legislative findings

The general assembly finds that the dairy industry is an integral part of the economy, culture and physical

make-up of Vermont. Recent cuts in the federal dairy market price structure threaten this vital industry by reducing the income received by Vermont dairy farmers to a bare minimum. The legislature therefore concludes that an emergency program to stabilize income received by dairy farmers must be enacted to preserve the dairy industry during this critical period. The legislature further finds that the program should be implemented immediately and last for a period of one year to provide stability during the time when it is hoped that a federal regional dairy price policy will be established or an interstate compact imposing an over-order premium will be formed. It is the further intent of the legislature to encourage participants in this program to participate in the agricultural and forest lands' taxation program, 32 V.S.A. chapter 124. – Added 1987, No. 200 (Adj. Sess.), § 61, eff. May 19, 1988.

§ 2992. Definitions

As used in this chapter:

(1) "Commissioner" means the commissioner of agriculture or a designee of the commissioner.

(2) "Dairy farmer" means a person, including a partnership or corporation, who receives at least 50 percent of his or her annual gross income and no more than $32,000.00 net farm income, as set forth in Schedule F of his or her 1987 Internal revenue Service tax return, if available, or the equivalent part of his or her 1988 tax return from managing and operating a farm or farms which produce milk from cows located entirely within the state of Vermont, except that a corporation or other

business entity which holds record title to the eligible property shall be considered a farmer only if at least 50 percent of its stock or other ownership interest is owned or controlled by individual persons who are farmers or members of the immediate family of a farmer.

(3) "Handler" means a person, including a partnership or corporation, who purchases milk for resale. – Added 1987, No. 200 (Adj. Sess.), § 61, eff. May 19, 1988.

§ 2993. Program established; payment authorized

The dairy industry income stabilization program is created and shall be administered by the commissioner. The commissioner shall review applications and milk production data, and authorize payment to qualified dairy farmers, pursuant to section 2996 of this title, for milk produced beginning in March of 1988. The commissioner shall authorize payments under this chapter as long as the federal market order number one blend price for zone twenty-one remains under $13.00 per hundred pounds of milk produced. – Added 1987, No. 200 (Adj. Sess.), § 61, eff. May 19, 1988.

HISTORY

Revision note. In the second sentence, substituted "section 2996" for "section 2895" in view of the redesignation of former section 2895 as present section 2996. For explanation of redesignation of sections comprising this chapter, see note set out following the section analysis for this chapter.

§ 2994. Eligibility standards

Any dairy farmer who is a member of a regional marketing cooperative that encompasses the state of Vermont, including but not limited to the Regional Cooperative Marketing Agency, that obtains a market price for the participating producers' product that is above the federal market order price shall be eligible for payment under this chapter. All dairy farmers shall be eligible for payment if no such organization is in operation. – Added 1987, No. 200 (Adj. Sess.), § 61, eff. May 19, 1988.

§ 2995. Applications

The commissioner shall make application forms available for dairy farmers seeking payment under this chapter. The forms shall include, at a minimum, a provision authorizing the handler who purchases milk from the dairy farmer to provide the commissioner with information which identifies the farmer's monthly milk production for each farm. This authorization shall be valid only during the time the farmer is eligible for payment under section 2996(c) of this title. The application also shall include notification of the requirements of section 2998 of this title. – Added 1987, No. 200 (Adj. Sess.), § 61, eff. May 19, 1988.

HISTORY

Revision note. Substituted "section 2996(c)" for "section 2895(c)" in the third sentence and "section 2998" for "section 2897" in the fourth sentence in view of the redesignation of sections

2895 and 2897 as sections 2996 and 2998, respectively. For explanation of redesignation of sections comprising this chapter, see note following the section analysis for this chapter.

§ 2996. Payment procedure: amount per farmer

(a) A dairy farmer shall receive payment for the market milk that he or she produces, at the rate of $0.50 per hundred pounds of production, with the payments applying up to one million pounds per farm. Payment shall be made in two installments under subsections (c) and (d) of this section. No farm shall yield payment for more than one million pounds of production. The commissioner shall adjust the provisions of this subsection under subsection (d), as necessary.

(b) Upon receipt of an application, the commissioner shall direct the handler to provide the monthly milk production data for the applicant dairy farmer to the commissioner, as authorized. The handler shall provide the data within 15 days from the end of the month for which production data is supplied. The production information for the months of April and May of 1988 shall be provided at times determined by the commissioner. The commissioner shall verify the milk production information received from a dairy farmer's handler.

(c) The amount of the first payment shall be determined in the following manner: When verified production information has been received for three consecutive months, the commissioner shall estimate the farmer's total production and entitlement of payment for the period covered by this chapter. This first payment shall be in the amount of $2,000.00 or the total estimated

amount of the farmer's entitlement, whichever is less, and shall be made no later than July 15, 1988.

(d) The amount of the second and final payment shall be made in the following manner: Upon receiving the total production data for the period covered by this chapter, the commissioner shall determine each farmer's actual total production and entitlement of payment. The commissioner shall subtract the amount of payment received under subsection (c) from the amount the farmer is actually entitled to receive. If the amount remaining in the fund equals exactly the sum of these payments, the commissioner of agriculture shall certify such payments.

(1) If the amount remaining in the fund is less than the amount needed to provide these payments, the commissioner of agriculture shall prorate the final payments. The percentage of proration per farmer shall be an amount per hundred pounds of milk produced, to be computed by dividing the deficit amount in the fund by the total number of pounds of milk produced by the dairy farmers participating in the program.

(2) If the amount remaining in the fund is greater than the amount needed to provide these payments, the surplus shall be deposited in the fund created by 10 V.S.A. § 361. The final payment shall be made no later than April 30, 1989. – Added 1987, No. 200 (Adj. Sess.), § 61, eff. May 19, 1988.

§ 2997. Dairy industry income stabilization fund

(a) There is hereby created a dairy industry income stabilization fund which shall be administered by the state treasurer to make payments under this chapter. The

fund shall consist of $7,500,000.00 from the surplus remaining at the end of fiscal year 1988 which is appropriated for this purpose.

(b) The commissioner is authorized to employ not more than three persons as exempt limited service state employees to administer the payment computation procedures required by section 2996 of this chapter, or to contract with a private organization for the computation services. Expenses covering the cost of this employment and other reasonable administrative expenses shall be paid from the fund created by this section. The sum of $11,250.00 is appropriated from the general fund to the dairy industry income stabilization fund for fiscal year 1988 for the expenses of employment in that fiscal year.

(c) The program shall provide payment for milk produced through February 1989, and the fund shall terminate with the final payments made for that month. – Added 1987, No. 200 (Adj. Sess.). § 61, eff. May 19, 1988.

History

Revision note. In the first sentence of subsec. (b), substituted "section 2996" for "section 2895" in view of the redesignation of former section 2895 as present section 2996. For explanation of redesignation of sections comprising this chapter, see note following the section analysis for this chapter.

§ 2998. Sale of farm; notification

A dairy farmer who has received payment under this chapter, and who obtains an offer for the sale of his or her farm before February 1, 1989, shall notify the Vermont

housing and conservation board before accepting the offer. If the potential buyer intends to take the land out of agricultural production, the board shall have a right of first refusal for the sale of the entire property at the offered price. The board shall notify the farmer within 30 days of receiving notice whether it intends to acquire the farm: if the board decides to purchase and the farmer can convey marketable title, the state shall complete acquisition within 60 days of receiving notice. If the farmer is unable to provide marketable title, the time for performance shall be extended for an additional 90 days, if mutually agreeable. – Added 1987, No. 200 (Adj. Sess.), § 61, eff. May 19, 1988.